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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

AUG 21 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Local Exchange Carriers' Rates,) CC Docket No. 93-162
Terms, and Conditions for)
Expanded Interconnection for)
Special Access)

COMMENTS ON PETITION FOR CLARIFICATION

U S WEST Communications, Inc. ("U S WEST"), through counsel,
hereby files these comments on the Petition for Clarification ("Petition") filed
by The Bell Atlantic Telephone Companies ("Bell Atlantic") in the above-
captioned docket.

Bell Atlantic observes in its Petition that the Common Carrier Bureau,
in its Supplemental Designation Order,¹ did not accurately characterize the
current state of the law concerning services or facilities provided on an
individual case basis (ICB). The Supplemental Designation Order had
asserted as longstanding FCC policy the position that ICB service constitute
general common carrier offerings "if tariffs embodying these rates are filed
and are available to all similarly situated customers."² This conclusion

¹In the Matter of Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, Supplemental Designation Order and Order to Show Cause, 9 FCC Rcd. 2742 (1994) ("Supplemental Designation Order").

² Id. at 2744 n.35.

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appears inconsistent with the holding of the D.C. Circuit Court of Appeals in Southwestern Bell Telephone Co. v. FCC)³, the case in which the FCC's application of a similar principle to carrier ICB dark fiber services was reversed.

Bell Atlantic is correct in its assertion that the language in the Supplemental Designation Order does not accurately characterize the state of the law at this time. Services provided on an ICB basis are not general carrier offerings - at least not solely on account of the ICB service itself or the filing of an ICB rate in a carrier tariff. Should the FCC desire to adopt a position in a rulemaking which automatically made ICB services general offerings, the new rule would, of course, be subject to the test of reasoned decision-making. In fact, as a carrier's ability to innovate and experiment through ICB services could be seriously undercut by restricting ICB services in the manner described in the Supplemental Designation Order, it would no doubt be a bad regulatory idea to adopt such a rule.

It is, of course, possible to read the language in the Supplemental Designation Order as doing nothing more than stating the obvious - that a carrier cannot use the ICB route to evade the requirements of Title II of the Communications Act. We have no quarrel with that proposition. Even here, however, if a carrier were to cross the line and offer "too many" ICB configurations of a particular service, the Commission's proper response

³ 19 F. 3d 1475 (D.C. Cir. 1994).

would be to give the carrier a choice between changing the service to a general offering or withdrawing it. There is simply no valid public purpose to be served by reenacting the scenario created in the Dark Fiber proceeding - wherein the Commission attempted to utilize the fact of ICB dark fiber offerings to coerce carriers into the dark fiber business against their will.

However, the offensive language in the Supplemental Designation Order, if interpreted as contrary to the Court's decision and actual past FCC practice, would clearly be of no legal effect. Neither the FCC nor its staff can modify important legal, procedural and precedential principles without utilizing the processes mandated under the Administrative Procedure Act - failure to follow the proper path to reasoned decision-making resulted in reversal of the FCC's Dark Fiber decision in the first place, and rules simply dropped from nowhere in an FCC tariff proceeding can clearly have no binding force. Nevertheless, the statement in the Supplemental Designation Order is unnecessarily confusing to carriers and customers. The Commission, in the name of providing clear guidance to the industry, ought to modify the language in the Supplemental Designation Order to conform to the language which the Court found in the Dark Fiber decision to accurately reflect FCC ICB policy:

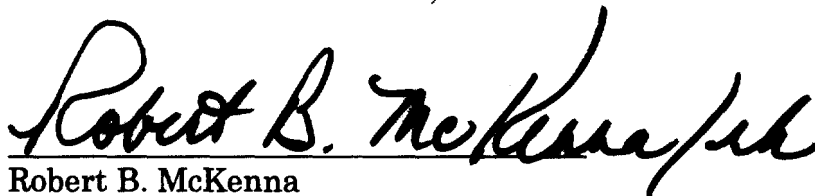
ICB offerings are those offered on a contract-type basis. While ICB offerings appear in LEC tariffs, they are not tarified as generally available common carrier services.⁴

Any change in this policy should be made via rulemaking.

Respectfully submitted,

U S WEST Communications, Inc.

By:

A handwritten signature in cursive script, reading "Robert B. McKenna", followed by a diagonal slash and the letters "jrh".

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Of Counsel,
Laurie J. Bennett

August 29, 1994

⁴ Southwestern Bell Telephone Co. v. FCC at 1482.

CERTIFICATE OF SERVICE

I, Roanne Kuenzler, do hereby certify that on the 29th of August, 1994, a copy of the foregoing **COMMENTS ON PETITION FOR CLARIFICATION** was served via first-class U.S. Mail, postage prepaid, upon the persons listed on the attached service list.


Roanne Kuenzler

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